

Memorandum to the File
Case ClosureAlleged Nepotism, Abuse of Authority, Favoritism, and Reprisal
Philadelphia VA Regional Office and Insurance Center
(2012-00963-IQ-0047)

The VA OIG Administrative Investigations Division did a preliminary investigation into allegations that management officials at the Philadelphia VA Regional Office and Insurance Center (VARO) engaged in nepotism, abuse of authority, favoritism, and reprisal. To assess these allegations, we reviewed email, Equal Employment Opportunity (EEO), and court records, as well as official personnel folders (OPF). We also reviewed applicable Federal laws and regulations.

Federal law states that a public official may not appoint, employ, promote, advance, or advocate for the appointment, employment, promotion, or advancement, in or to a civilian position, any person who is a relative of the public official. 5 USC § 3110. Federal law also requires that the recruitment, selection, and advancement of Federal employees be based on merit after fair and open competition. 5 USC § 2301(b). The Standards of Ethical Conduct for Employees of the Executive Branch require employees to act impartially and not give preference to any individual and prohibit an employee from using his public office for the private gain of relatives. 5 CFR § 2635.101 and .702. The Merit System Protection Board defines an "abuse of authority" as an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain to preferred other persons. D'Elia v. Department of the Treasury, 60 M.S.P.R. 226, 232 (1993), overruled in part on other grounds by Thomas v. Department of the Treasury, 77 M.S.P.R. 224, 236 n.9 (1998).

(b) (7)(C) contacted VA OIG concerning allegations of misconduct by VARO management officials. Many of the issues alleged by (b) (7)(C) were several years old, and the examples he gave were insufficient to support his allegations. For example, he alleged nepotism, cronyism, and favoritism because named employees had family members also working at the VARO. Personnel records reflected that these identified employees began their VA employment more than 2 years ago, and in some cases, over 25 years ago. The record retention for recruitment documents is 2 years, so these records are most likely no longer available. A review of the named employees' OPFs reflected no signatures of family members on any personnel action request documents. Additionally, the VARO website reflected that there were about 1,400 employees at the VARO, and personnel records reflected that the hiring efforts and personnel actions for the named employees spanned over 25 years.

Allegations of Nepotism, Abuse of Authority, and Favoritism

(b) (7)(C) gave one example of a husband and wife beginning their employment on the same day for identical positions and that they were on a "fast track" because of

family members at the VARO. Personnel records reflected that these employees, both with veterans' preference, were selected from a competitive certificate at entry level VSR trainee positions and that their career ladder promotions were consistent with those positions. Further, the employees were recently, within the past year, separately selected from two different certificates for other trainee positions that had promotional potential above their current grade level. However, records reflected that they were to be kept at their same grade level for a 1-year period so as to assess their performance within the new trainee positions.

In another example, (b) (7)(C) alleged that an employee was terminated twice but kept her job because of a friendship at the VARO. Personnel records reflected that the employee, with 30 years' Federal service, was to be removed from her position effective March 19, 2010, for "dishonest conduct." Records also reflected that she was placed on leave without pay from May 3, 2010, to August 29, 2010, and that when she returned to work on August 29, she was demoted from her (b) (7)(C) position to a (b) (7)(C) position, with a \$30,000 reduction in annual salary. This action was consistent with management discretion and/or a settlement reached between the employee and the agency arising from the alleged misconduct, taking into account the employee's years of service and the Douglas Factors (criteria supervisors use in determining an appropriate penalty for an act of misconduct).

Misuse of Performance Improvement Plans

(b) (7)(C) alleged that management officials misused performance improvement plans (PIP) to "retaliate against whistleblowing" veteran employees, to include himself. He gave examples for two other employees, and personnel records reflected that the employees were removed for unacceptable performance. Records reflected that one of the employees, a (b) (7)(C) received a 2-day suspension for loud, abusive, and disrespectful conduct and was later removed for unacceptable performance. The other, a (b) (7)(C) was denied a within-grade increase, due to an unacceptable level of competence, and he was later removed for unacceptable performance. (b) (7)(C) alleged that this employee asked for reasonable accommodations, but records reflected that the employee provided a related document only at the time of his oral reply to his proposed removal. Moreover, these two employees were entitled to appeal processes, and there was no indication that they, at that time or since, sought a reversal of the adverse actions through internal or external grievance and appeal processes that were available to them.

In a third example, (b) (7)(C) cited a hearsay conversation between an employee and supervisor in which no adverse action had yet occurred and actions were speculative.

Criminal Allegations

(b) (7)(C) s allegations of an illegal bribe by a supervisor to increase an employee's disability rating in return for the employee's resignation and of fraud and corruption at

the facility daycare center were referred to OIG Criminal Investigations Division, and they will not be further discussed.

EEO Complaint for Hostile Work Environment and Reprisal

(b) (7)(C) alleged that he and two other employees filed an Equal Employment Opportunity (EEO) complaint for age discrimination, harassment, and hostile work environment. The U.S. Equal Employment Opportunity Commission (EEOC) website states that EEOC is the Federal agency responsible for enforcing Federal laws prohibiting employment discrimination; that in the Federal sector, employees file complaints with their own agencies; and that those agencies conduct a full and appropriate investigation.

EEO records reflected that (b) (7)(C) filed his complaint on (b) (7)(C). In an October 13, 2011, response letter, the Regional EEO Officer told (b) (7)(C) that they determined "your claim of harassment fails the severe or pervasive requirement for further processing. You have identified fourteen incidents that occurred over an eighteen month period of time; and, none of the events can be construed from a reasonable person standpoint to be physically threatening or humiliating, or be considered matters that would create an intimidating, hostile, or offensive working environment...nor do they evince a pattern or offensive conduct that would reasonably create a hostile or abusive work environment for anyone." The EEO Officer told (b) (7)(C) that his reprisal complaint, which was related to (b) (7)(C) was accepted for investigation.

Class Action Lawsuit

(b) (7)(C) alleged that he and another employee filed a class action lawsuit, and records of the U.S. District Court for the Eastern District of Pennsylvania reflected that on October 18, 2011, (b) (7)(C) filed a (b) (7)(C) against VA, the VARO Director, and John Does 1-10 to redress violations of the Fair Labor Standards Act. Records reflected that (b) (7)(C) et al. believed that the Defendants maintained an unlawful wage payment system for the past 3 years based on the facts that the employees were required to work 8 ½ hours each work day; they rarely took lunch breaks; they therefore worked 42.5 hours per workweek; and they were not paid for at least 2.5 hours of overtime each week.

U.S. Office of Special Counsel

(b) (7)(C) alleged that he and the other employees also filed a complaint with the U.S. Office of Special Counsel (OSC). The OSC website states that they are an independent Federal investigative and prosecutorial agency with authority from the Civil Service Reform Act, Whistleblower Protection Act, Hatch Act, and Uniformed Services Employment & Reemployment Rights Act (USERRA). It also states that their mission is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.

Conclusion

Although (b) (7)(C) provided the names of a number of employees working at the VARO who are relatives, he did not provide sufficient details or evidence of nepotism, abuse of authority, or favoritism in connection with their appointments or promotions. In a workforce of about 1,400 employees and with over a 25-year span of hiring efforts and personnel actions it would not be unusual to find some that are family members, and if a VA official did not select the most qualified candidate based on them having a family member working at the VARO, it would be a prohibited personnel practice. Moreover, there is a 2-year retention for hiring documents, and it is likely that records for these recruitment efforts are no longer available for review or further meaningful investigation.

We found no evidence in the employees' OPFs that a family member signed a personnel action request as a recommending or approving official. We also found that two employees that were allegedly shown favoritism because of family were kept at the same grade level, even though they were entitled to a higher grade level, so that they could be assessed properly in their new trainee positions. Further, we found that an employee that was allegedly shown favoritism due to a friendship received significant disciplinary actions when she was placed on leave without pay and then demoted as the result of her misconduct. These preliminary findings undercut the credibility of (b) (7)(C)'s assertion that the employees were "fast-tracked" or favored because of a family relationship or friendship. Based on the passage of time and a lack of evidence, there is no need for OIG to expend resources on investigating these matters.

(b) (7)(C) alleged that VARO managers misused PIPs, and he gave three examples. In two, personnel records reflected that the trainee employees were removed for unacceptable performance, with one having received a previous 2-day suspension for loud, abusive, and disrespectful conduct. Although they were entitled, we found no indication that they sought a reversal of the adverse actions through grievance and/or appeal processes that were available to them. In his third example (b) (7)(C) speculated on a future event, based on hearsay information. (b) (7)(C)'s allegations concerning performance-based actions of coworkers involved private information to which he was not legally entitled and in the absence of complaints from the employees directly, do not warrant OIG review.

In addition to his (b) (7)(C) lawsuit, (b) (7)(C) filed complaints through EEO and OSC. The EEO investigation concluded that his complaint of a hostile or abusive work environment did not have merit, and based on their conclusions, there is no need for OIG to duplicate their efforts. They, however, accepted (b) (7)(C)'s complaint of reprisal due to being placed on a PIP. We are concerned that any investigation by OIG into these matters would duplicate EEO and OSC efforts; that the investigative bodies may interfere with one another and the witnesses during their respective investigations; and more importantly, EEO and OSC maintain jurisdiction over these matters, can issue

administrative subpoenas for testimony and documentary evidence, and can provide (b) (7)(C) with direct relief through their respective processes. For these reasons, OIG should not separately review the allegations that were raised in the OSC and EEO venues. Analogously, OIG should not investigate issues in which (b) (7)(C) is in litigation with the Government in Federal court, namely, (b) (7)(C) as such an investigation would duplicate and may interfere with the Department of Justice's defense of the lawsuit.

The EEO and OSC processes will give VBA an opportunity and the responsibility to challenge (b) (7)(C)'s allegations and to defend the reasons for their actions. We therefore recommend that the allegations be referred to VBA to be held in abeyance of the EEO and OSC investigations and their final reports or decisions. Should any issues raised by (b) (7)(C) remain unresolved following the resolution of the EEO and OSC cases, VBA could then consider additional investigative efforts.

Prepared By:

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12/22/2011
Date

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12/22/2011
Date